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No. 89-1909

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FEIST PUBLICATIONS, INC.,

Petitioner,

v.

RURAL TELEPHONE SERVICE COMPANY, INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Tenth Circuit

BRIEF OF THE THIRD-CLASS MAIL ASSOCIATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER
FEIST PUBLICATIONS, INC.

IAN D. VOLNER*

LAUREN M. BLOOM

1333 New Hampshire Ave., N.W.

Suite 600

Washington, D.C. 20036

(202) 293-3860

*Counsel for the Third Class
Mail Association*

* *Counsel of Record*

QUESTION PRESENTED

Does the copyright in a telephone directory by the telephone company prevent access to that directory as a source of names and numbers to compile a competing directory, or does copyright protection extend only to the selection, coordination or arrangement of those names and numbers?

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PRELIMINARY STATEMENT

The Third Class Mail Association ("TCMA") submits this brief as *amicus curiae*, pursuant to Rule 37.3 of the Rules of this Court, in support of Petitioner, Feist Publications, Inc. ("Feist").¹

¹ The written consents of Petitioner Feist and Respondent Rural Telephone Service Company, Inc. ("Rural Telephone") to TCMA's filing of a brief as *amicus curiae* are being filed with the Clerk of the Court contemporaneously herewith.

INTEREST OF TCMA AS *AMICUS CURIAE*

Although the Court has accepted for review the limited question of whether the copyright in a telephone directory by a telephone company prevents access to that directory as a source of names and numbers to compile a competing directory, the potential implications of the case are significantly broader in scope. The issue of access to information may have profound effects upon other industries, including the direct mail marketing industry. A broad finding that a telephone company's copyright in a telephone directory prevents use of that directory as a commercial source of names, addresses and telephone numbers would effectively deprive direct mail marketers of access to information which they need to operate their businesses or fund their charitable causes.

TCMA is a national association of organizations, both charitable and for-profit, with an interest in direct mail marketing. TCMA's members make use of the United States Postal Service's bulk third-class mail rate categories for a wide variety of direct marketing, educational, financial and fund-raising activities. Direct mail marketing makes available information about products, services and eleemosynary activities, enabling large and diverse segments of the American public to acquire those products and services and support charitable undertakings in a readily accessible and inexpensive manner.² Some of TCMA's members

² There are, at present, approximately 30,000 direct mail and telephone marketing companies in the United States, most of which are small businesses operated by independent entrepreneurs. The direct mail marketing industry produces approxi-

also compile, publish and rent mailing lists for use in marketing and fund-raising activities.

Direct mail marketing is conducted through the use of lists, often compiled in large part or significantly derived from telephone directories. Indeed, local telephone companies are often the exclusive source in a given area of name and address information for list development. Direct mail marketers have relied upon telephone directories for name, address and telephone number data to compile lists of businesses and potential customers or contributors for more than 50 years. The information which marketers and support companies obtain from telephone directories is entered into computers to be coded and sorted, and additional information is added for use by mailers.³ This process permits the development of selective mailing lists of persons who are more likely to be interested in purchasing a particular product or service, or contributing to a particular charitable organization.

Information contained in telephone directories is also used to update aging lists with current data. Local telephone companies enjoy superior access to the most current information concerning their subscribers, because it is the telephone companies that assign telephone numbers to particular individuals at

mately fifty billion pieces of mail annually, with a value in excess of twenty billion dollars.

³ For consumer files, coding and sorting may include the addition of such information as zip codes, census data, automobile information, and responses to questionnaires concerning purchasing habits. For business files, coding and sorting includes the addition of information such as number of employees, executive names, titles and function, and type of business.

particular addresses. Subscriber information in the possession of local telephone companies typically is current to the week, if not to the day, service is installed. Using the data in telephone directories is, therefore, the most efficient and accurate—and sometimes the only—way for small direct marketing companies to obtain current information about telephone subscribers.

Accordingly, a holding that the underlying data in telephone directories is subject to copyright, and that use of such directories to obtain such underlying data is a violation of federal copyright law, would have far-reaching effects upon the direct mail marketing industry. As a representative of that industry, TCMA is concerned that these potential consequences be recognized in the Court's deliberation on the issues presented by this case.

SUMMARY OF ARGUMENT

The lower courts erred in holding that federal copyright law protects the preexisting facts underlying compilations such as telephone directories. The 1976 Copyright Act limits the copyright protection afforded compilations to the selection, coordination and arrangement of information. It does not permit a party to obtain control over a set of preexisting facts by collecting and arranging them into a compilation, and then claim copyright protection not only for the compilation as a whole, but also for the underlying data.

A holding that telephone companies can obtain copyright protection for the names, addresses and telephone numbers of subscribers listed in their telephone directories would have ramifications far beyond the

facts of this case. Direct mail marketing companies rely upon telephone directories as a primary source of name and address data. A decision that the use of telephone directories to obtain such data violates federal copyright law would deprive direct marketers of what is, in many instances, their only source of data essential to the continued operation of their businesses.

TCMA therefore requests that the Court overturn the decisions of the courts below, or carefully limit its decision to its specific factual context.

ARGUMENT

TCMA does not dispute that compilations, including some telephone directories, are entitled to copyright protection. *E.g.*, *Southern Bell Telephone and Telegraph Co. v. Associated Telephone Directory Publishers*, 756 F.2d 801, 809 (11th Cir. 1985). However, TCMA believes that the lower courts' implicit holding that a compilation copyright protects the irreducible factual data contained in the compilation constituted a serious error of law.

The courts below applied what has been described as the "sweat of the brow" doctrine, to extend broad copyright protection to all or any part of a compilation that is the product of "industrious collection," including any underlying, preexisting facts. *See Rural Telephone Service Company, Inc. v. Feist Publications, Inc.*, 663 F. Supp. 214, 218 (D. Kan. 1987). *aff'd*, No. 88-1679 (10th Cir. March 8, 1990). This doctrine,

which has been applied by a minority of the circuits,⁴ conflicts with Section 103(b) of the 1976 Copyright Act, which provides in pertinent part that "[t]he copyright in a compilation or derivative work extends *only* to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material." 17 U.S.C. § 103(b) (emphasis added). *See also*, 17 U.S.C. § 102(b) (facts not copyrightable).⁵ The Act thus draws a very sharp distinction between the protectible originality and creativity which go into the form of expression of the compilation on the one hand, and the unprotectible "pre-existing material" used in that expression on the other. *See Southern Bell, supra*.

The distinction is crucial to this case. The "pre-existing material" in a telephone directory is irreducible—the facts of names, addresses and telephone numbers can only be expressed in one form. Because telephone companies are almost always the first pub-

⁴ *See, e.g., Rockford Map Publishers, Inc. v. Directory Service Company of Colorado, Inc.*, 768 F.2d 145 (7th Cir. 1985); *Hutchinson Telephone Co. v. Fronteer Directory Company of Minnesota, Inc.*, 770 F.2d 128 (8th Cir. 1985).

⁵ The 1976 Copyright Act defines "compilation" as:

[A] work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works.

17 U.S.C. § 101.

lishers of directory information,⁶ a holding that the "sweat of the brow" doctrine provides copyright protection not only to a directory as a compilation, but also to the names, addresses and telephone numbers of subscribers, would give the telephone companies an initial monopoly over that important information. Proponents of the "sweat of the brow" doctrine do not—and cannot—contend that a second publisher is precluded from independently collecting names, addresses and telephone numbers and from publishing that information exactly as it appears in the telephone company's directory. Thus, extension of copyright protection to information which exists in an irreducible form (such as names, addresses and telephone numbers) serves only to protect a source of information and the research which produced it, rather than the originality or creativity of the expression itself.

Such a result, at the least, stretches the "sweat of the brow" doctrine beyond cases in which the information alleged to have been copied exists in a form different than the form of the first author's compilation, *see, e.g., Rockford Map, supra*, or is capable of complete expression in a different form. *Southern Bell, supra*. The lower courts' analysis thus collides with the language and purpose of the Act. *See, e.g., Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S.

⁶ Indeed, the facts of name, address and telephone number—the last element of which is unknown until assigned by a telephone company—are not generally available except through publication by the telephone company which has collected them as an adjunct to the initiation or change of telecommunications service.

1009 (1967). It would also have ramifications far beyond the facts of this case; it would seriously hamper the ability of direct mail marketers and the companies which supply them with mailing lists to conduct their businesses or fund their causes.

The courts below also held that the only "fair use" Feist could make of Rural Telephone's directory would be to verify the results of its own independent canvass. *Rural Telephone, supra*, 663 F. Supp. at 219 (citations omitted). If it is decided—as we believe it should be—that the pre-existing material in the telephone directory is not protected by copyright, there is no need to determine the correctness of the lower courts' application of the "fair use" doctrine. In any event, the lower courts' application of the doctrine is wrong because it simply ignores the statutory criteria governing "fair use". 17 U.S.C. § 107.

Even if Section 107 were held to permit only verification of information obtained by independent canvass, that holding should be restricted to situations involving uses which are directly competitive—as in the case of competing telephone directories. Otherwise, the lower courts' holding as to "fair use" could deprive direct mail marketers of what is, in many instances, their only practical source of essential information—information used in ways which have no cognizable effect upon the "potential market" for telephone directories. *See* 17 U.S.C. § 107(4).

The question presented before the Court involves the narrow circumstances in which a publisher uses a telephone company's directory as a source of information to compile a competing directory. As TCMA has shown, a broadly-written decision from the Court affirming the lower courts' decisions would have a

substantial negative impact upon other companies not engaged in the business of producing competing telephone directories. Accordingly, even if the Court does not accept our contention that the underlying information—names, addresses, and telephone numbers—is not subject to copyright protection, TCMA requests that the Court limit its decision to the circumstances described in the question presented to the Court.

CONCLUSION

For the foregoing reasons, TCMA requests that the decisions of the lower courts be reversed.

Respectfully submitted

IAN D. VOLNER*
LAUREN M. BLOOM
COHN AND MARKS
1333 New Hampshire Ave., N.W.
Suite 600
Washington, D.C. 20036
(202) 293-3860

*Counsel of Record

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